Dec 29, 2000 (1)

Supreme Court, U.S.
FILED
DEC 29 2000
OFFICE OF THE CLERK

No. 99-9136

In The

Supreme Court of the United States

EARTHY D. DANIELS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONER

MARIA E. STRATTON
Federal Public Defender
G. MICHAEL TANAKA*
Deputy Federal Public Defender
321 East Second Street
Los Angeles, California 90012
(213) 894-4140

Counsel for Petitioner
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

20 pp

TABLE OF CONTENTS

Page

ARGUMENT 1

A. *Custis* Did Not Constitutionalize ACCA Sentences Tainted by Unconstitutional Prior Convictions 1

B. Adjudicating the Constitutionality of Petitioner's Prior Convictions at a Section 2255 Proceeding Poses No Undue Administrative Burdens and No Danger to Federalism Interests 7

C. Petitioner's Custody Under the ACCA Sentence Allows Him to Challenge His Sentence to the Extent it Was Enhanced by Unconstitutional Prior Convictions 14

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Calderon v. Thompson, 523 U.S. 538 (1998).....9, 10

Coss v. Lackawanna, 204 F.3d 453 (3d Cir. 2000), cert. granted, 121 S.Ct. 297 (Oct. 10, 2000) 15

Custis v. United States, 511 U.S. 485 (1994) ...1, 2, 4, 7

Edwards v. Carpenter, 120 S.Ct. 1587 (2000)..... 6

Engle v. Issac, 456 U.S. 107 (1982) 13

Garlotte v. Fordice, 515 U.S. 39 (1995)..... 7

Gideon v. Wainwright, 372 U.S. 335 (1963) 1, 2, 3

Maleng v. Cook, 490 U.S. 488 (1989) 14, 15

McCleskey v. Zant, 499 U.S. 467 (1991)..... 6

Mooney v. Holohan, 294 U.S. 103 (1935) 2

Moore v. Dempsey, 261 U.S. 86 (1923)..... 2

Needer v. United States, 119 S.Ct. 1827 (1999)..... 8

Nichols v. United States, 511 U.S. 738 (1994) 12

O'Sullivan v. Boerckel, 526 U.S. 838 (1999) 6

Parke v. Raley, 506 U.S. 20 (1992).....7, 11

Ryan v. United States, 214 F.3d 877 (7th Cir. 2000) 4

Stanley v. Illinois, 405 U.S. 645 (1972)..... 8

State of Arizona v. Hunt, 408 F.2d 1086 (6th Cir. 1969)..... 11

Teague v. Lane, 489 U.S. 288 (1999) 6

TABLE OF AUTHORITIES – Continued

Page

United States v. Bates, 77 F.3d 1101 (8th Cir. 1996) 12

United States v. Bosch, 951 F.2d 1546 (9th Cir. 1991)..... 6

United States v. Cronic, 466 U.S. 648 (1984) 6

United States v. Frady, 456 U.S. 152 (1982) 5, 6, 7

United States v. McLean, 138 F.3d 1398 (11th Cir. 1998)..... 6

United States v. Tucker, 404 U.S. 443 (1972) 2

United States v. Walker, 198 F.3d 811 (11th Cir. 1999)..... 3

Wainwright v. Sykes, 433 U.S. 72 (1977)..... 13

Withrow v. Williams, 507 U.S. 680 (1993)..... 9

CONSTITUTION AND FEDERAL STATUTES

U.S. Const. Art. IV, § 1 13

21 U.S.C. § 851 13

28 U.S.C. § 2254 ..... 9, 12, 13

28 U.S.C. S 2255 ..... *passim*

Fed.R.Civ.P. 24(a) 11

Rules Governing § 2255 Proceedings 5, 11

Rule 4(b) of the Rules Governing § 2255 Proceedings..... 4

TABLE OF AUTHORITIES – Continued

Page

Rule 9(a) of the Rules Governing § 2255 Proceedings 4

Rule 12 of the Rules Governing § 2255 Proceedings 11

OTHER AUTHORITIES

U.S. Sentencing Commission, *1999 Sourcebook of Federal Sentencing Statistics* 8

ARGUMENT

A. *Custis* Did Not Constitutionalize ACCA Sentences Tainted by Unconstitutional Prior Convictions

In *Custis v. United States*, 511 U.S. 485 (1994), this Court held that facially valid (but potentially unconstitutional) prior convictions could not be challenged at the sentencing hearing unless they were tainted by a violation of the right to counsel. Respondent argues that *Custis* also necessarily held that a sentence based on potentially unconstitutional prior convictions (for reasons other than *Gideon*[1] violations) was not itself unconstitutional. See Resp. Br. 10, 12. That is wrong. *Custis* did not constitutionalize sentences founded on unconstitutional prior convictions; it merely restricted litigation of that issue at sentencing to violations of the right to counsel. By allowing for the possibility that a defendant could move to reopen his federal sentence if the prior conviction was subsequently vacated on habeas, *Custis* implicitly suggested that a sentence based on an unconstitutional prior conviction – even one facially valid at the time of sentencing – was itself unconstitutional. *Custis v. United States*, 511 U.S. 485, 497.

Once the legitimacy of reopening the federal sentence is acknowledged, the fallacy of respondent's argument becomes apparent. The sentence is not beyond challenge; it is not immutably constitutional because the prior conviction was facially valid at the time of sentencing. At most, it is presumptively constitutional absent a showing that the prior conviction is unconstitutional, and *Custis*

---

[1] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

stands for nothing more than the unremarkable proposition that the federal sentencing hearing is not the proper forum to show that prior convictions (except for *Gideon* violations which will be readily apparent) were unconstitutionally obtained. Nothing in the language of *Custis* suggests that it reversed the longstanding principle that it violates due process to base a sentence "upon misinformation of constitutional magnitude." *United States v. Tucker*, 404 U.S. 443, 447 (1972).

Under respondent's interpretation of *Custis*, an ACCA sentence predicated upon prior convictions that suffered from obvious and severe constitutional infirmities would not violate due process so long as the prior convictions were not tainted by *Gideon* violations. This would necessarily include convictions tainted by constitutional violations that, like *Gideon* violations, were historically cognizable on habeas corpus even before the expansion of its reach. *See, e.g., Mooney v. Holohan*, 294 U.S. 103 (1935) (knowing use of perjured testimony cognizable on federal habeas); *Moore v. Dempsey*, 261 U.S. 86 (1923) (due process violation where conviction obtained under pressure of mob violence cognizable on federal habeas). And even if the defendant could prove a constitutional violation had prevented him from conclusively demonstrating his innocence of the prior crime, perhaps based on DNA testing, respondent would still require that the underlying conviction be used to impose an enhanced sentence – as long as the conviction had not

been vacated in other proceedings.[2] *Custis* did not so hold.

The near unanimity of the Circuit Courts in allowing a reopening of the federal sentencing once the prior conviction has been successfully attacked provides persuasive evidence of this fact. *See United States v. Walker*, 198 F.3d 811, 813 (11th Cir. 1999) (collecting cases). If *Custis* truly held, as respondent suggests, that only prior convictions tainted by *Gideon* violations were constitutionally barred as sentence enhancements, there would be no need to reopen the federal sentencing if those prior convictions were subsequently vacated on any grounds other than lack of counsel. These cases make clear that other constitutional violations are relevant to the legality of the federal sentence.

---

[2] Both amicus and respondent fault defendants who failed to challenge the primary effect of their convictions while still under their custody, arguing that they have effectively waived any constitutional challenges, even when the conviction is used for a different purpose. Resp. Br. 18; Amicus Br. 7. Their argument, however, rests on a false assumption – that defendants will always have an opportunity (either by direct appeal or collateral review) to challenge the constitutionality of their convictions. Many constitutional violations, such as ineffective assistance of counsel claims, knowing use of perjured testimony, and suppression of favorable defense evidence, may not be raised on direct appeal because they depend on evidence outside the record of trial. Many of these same claims may also be beyond the reach of habeas litigation because the defendant was no longer in custody at the time the claims were discovered or after the direct appeal was finished. And as argued in petitioner's brief, a defendant may have failed to challenge the prior convictions in state court for many reasons that do not imply a waiver. Pet. Br. 21-22.

1. Respondent further supports its argument by observing that allowing an attack on the prior conviction at a section 2255 proceeding would reduce *Custis* to a "curiously futile gesture" because the defendant could subsequently mount the identical challenge precluded by *Custis* at the sentencing hearing. Resp. Br. 15. Again, respondent is wrong.

First, shifting the forum from sentencing to a section 2255 proceeding automatically narrows the class of available claims, preserving judicial resources. *See, e.g., Ryan v. United States*, 214 F.3d 877, 886 (7th Cir. 2000) (Wood, J., dissenting) ("Well established principles governing § 2255 proceedings would leave the door open to that far smaller universe of complaints."), petition for cert. pending, No. 00-6554. Second, because the defendant bears the entire burden, a section 2255 court can quickly dispose of insubstantial claims. *See, e.g.*, Rule 4(b) of the Rules Governing § 2255 Proceedings ("If it plainly appears from the face of the motion and the annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal. . . . "). Third, section 2255 procedures provide the Government with additional defenses to the challenge to the sentence. *See, e.g.*, Rule 9(a) of the Rules Governing § 2255 Proceedings ("A motion for relief pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing. . . . "). Finally, shifting some claims to a section 2255 proceeding makes practical sense because it relieves the sentencing court from having to litigate potentially complex challenges at a routine sentencing hearing.

These claims are more appropriately litigated in a section 2255 proceeding where there are specifically established rules and procedures to govern claims requiring factual development and to resolve disputed facts. *See, e.g.*, Rules Governing § 2255 Proceedings.

2. Respondent references this Court's general pronouncements in *United States v. Frady*, 456 U.S. 152 (1982) that relief on collateral review requires a higher showing than on direct appeal. This principle, respondent reasons, demonstrates that a section 2255 challenge cannot lie where the same challenge may not be made at sentencing or on direct appeal because that would allow the defendant "greater freedom to attack his sentence on collateral review than in the trial court or on direct appeal." Resp. Br. 16-17. Respondent, however, confuses the standard for review with the availability of review. *Frady* does not address the latter issue.

Certainly, if the statute permitted attacks on the prior conviction at sentencing, then, under *Frady*, the district court's decision on its validity would be entitled to deference on direct appeal and even greater deference on collateral review in a section 2255 action. That principle, however, does not apply where the initial challenge has been deferred to a section 2255 proceeding. Under respondent's interpretation of *Frady*, ineffective assistance of counsel claims that require further factual development could not be entertained in a section 2255 proceeding because they could not properly be brought at trial or on direct appeal. That is at odds with both the

law[3] and respondent's position in other cases.[4] Because petitioner's initial challenge to the constitutionality of his sentence is properly brought in a section 2255 proceeding, *Frady* does not bar relief.

This fact, that petitioner is challenging his federal sentence (and not his state court conviction), also answers respondent's contention once the defendant's right to review the prior conviction has passed or been forfeited, it may be used notwithstanding any potential constitutional violation. Resp. Br. 17-19. Each of the cases cited by respondent[5] involves challenges to the validity of the primary conviction, and, in each case, the Court held that the defendant could no longer challenge the validity of that conviction. Again, petitioner does not quarrel with that general proposition. Petitioner does not seek to

---

[3] *See, e.g., United States v. Bosch*, 951 F.2d 1546, 1549 (9th Cir. 1991) (customary procedure for challenging the effectiveness of defense counsel in a federal criminal trial is by collateral attack on the conviction under 28 U.S.C. § 2255 because such a claim cannot be advanced without the development of facts outside the original record); *United States v. McLean*, 138 F.3d 1398, 1406 (11th Cir. 1998) (ineffective assistance of counsel claim properly heard in section 2255 proceeding to allow fact-finding).

[4] "The Government argues that a defendant can attack the actual performance of trial counsel only through a petition for post-conviction relief under 28 U.S.C. § 2255, and not through direct appeal, because ineffective assistance claims are generally not properly raised in the District Court nor preserved for review on appeal." *United States v. Cronic*, 466 U.S. 648, 667, n.42 (1984).

[5] *Edwards v. Carpenter*, 120 S.Ct. 1587, 1591 (2000); *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999); *McCleskey v. Zant*, 499 U.S. 467 (1991); *Teague v. Lane*, 489 U.S. 288 (1999) (plurality opinion).

vacate his California convictions in this action. He merely challenges their use to enhance his federal sentence.[6]

B. Adjudicating the Constitutionality of Petitioner's Prior Convictions at a Section 2255 Proceeding Poses No Undue Administrative Burdens and No Danger to Federalism Interests

1. Respondent argues that administrative difficulties, invoked by *Custis* in support of its decision to bar challenges at sentencing, will be at least as serious in a section 2255 proceeding as they would be at a sentencing hearing. Resp. Br. 19-20. Respondent points to the difficulty in obtaining transcripts and the problems associated with litigating facts from years past as a reason to deny petitioner the opportunity to prove his claims. Those problems, however, are petitioner's problems, not the court's and not respondent's. At a section 2255 proceeding, petitioner bears the burden of proving his claims. *Frady*, 456 U.S. at 156. Thus, if transcripts are unavailable, petitioner may fail to meet his burden. *Cf. Parke v. Raley*, 506 U.S. 20 (1992) ("Due Process Clause permits a State to impose a burden of production on a recidivism defendant who challenges the validity of his prior conviction under *Boykin*"). If witnesses cannot be obtained because of the passage of time, petitioner may fail to meet his burden. *See, e.g., Garlotte v. Fordice*, 515 U.S. 39, 46 (1995)

---

[6] For that same reason, respondent's reference to the statute of limitations is beside the point. Resp. Br. 18. Petitioner's challenge to his federal sentence was timely under any standard.

("because the habeas petitioner generally bears the burden of proof, delay is apt to disadvantage the petitioner more than the State"). As petitioner is the party disadvantaged by the practical problems associated with litigating these claims, that difficulty provides no reason to preclude the litigation.

Moreover, that the litigation of the constitutionality of the sentence imposes some burdens on the court and litigants does not, alone, provide sufficient reason to close the courthouse doors. All parties retain a vital interest in ensuring that federal sentences rest on a constitutional foundation. On balance, due process requires that the smaller burden associated with litigating the claim give way to vindication of the more important interest in assuring a constitutional sentence. *Cf. Stanley v. Illinois*, 405 U.S. 645 (1972) (state's interest in convenience and efficiency must yield to unwed fathers' due process right to a hearing on his parental fitness before his children could be taken from him upon death of natural mother); *Needer v. United States*, 119 S.Ct. 1827, 1848 (1999) (Scalia, J., dissenting) (state's interest in expediency and convenience must yield to constitutional right to jury trial – even if the defendant is unquestionably guilty).[7]

---

[7] In any case, the potential burden on the federal courts appears relatively insignificant. According to statistics compiled by the United States Sentencing Commission, only 232 people were sentenced as armed career criminals in 1999. U.S. Sentencing Commission, *1999 Sourcebook of Federal Sentencing Statistics* 45. Presumably, a much smaller percentage of that number will be in a position to mount a credible section 2255 challenge to their sentence.

2. Respondent also argues that allowing an attack on the federal sentence as enhanced by the prior conviction allows defendants to circumvent the one-year statute of limitations set out in sections 2254 and 2255. Plainly it does not. As noted earlier, petitioner filed his action well within the one-year limitations period. Respondent's argument again confuses an attack on petitioner's current sentence with an attack on petitioner's prior state conviction. The latter is clearly time-barred, and petitioner does not seek reversal of that conviction. He seeks only to litigate its constitutional reliability as a predicate for enhancing his federal sentence. There is no anomaly. Unlike a collateral attack under section 2254, success in the current section 2255 action would impact only the federal sentence and would have no effect on the state court judgment. By contrast, when a section 2254 writ is granted, the federal court usually vacates the state court judgment. *See, e.g., Withrow v. Williams*, 507 U.S. 680, 721 (1993) (Scalia, J., concurring & dissenting) ("state courts routinely see their criminal convictions vacated by federal district court judges").

3. Similarly, that distinction substantially answers the finality concerns raised by respondent. Respondent cites *Calderon v. Thompson*, 523 U.S. 538 (1998) as illustrative of the "costs of reopening the validity of [petitioner's] old convictions." Resp. Br. 23. Closer examination of those "costs" reveals that they are not incurred in this case.

In *Calderon v. Thompson*, the Court observed that the exercise of habeas jurisdiction often came at the expense of the State's interest in the finality of convictions. The Court cataloged the important societal interests served by

finality of judgments. Foremost was the State's interest in executing its judgment: "Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Id.* at 556. Petitioner's attack on his sentence does not implicate that finality interest; the state has already executed its judgment, and it has been fully carried out. Nothing remains on that score.

For that same reason, the finality interest in preserving the balance between the states and the federal government is not implicated here. That balance is upset where the state cannot enforce its own criminal judgments. *Id.* at 555-556. Again, the state has completely enforced its judgment in the cases underlying the prior convictions, and this proceeding will not change that fact.

The final two interests served by finality are the deterrent effect of a final judgment and the enhancement of the "quality of judging" when state court judges are allowed to have the final word on the judgment. *Id.* at 555. Again, because petitioner has fully served his state sentences and received all the punishment due him for those crimes, he has necessarily experienced the full deterrent impact of those judgments of imprisonment. Similarly, because petitioner does not seek to overturn the state court judgments, there is no reason for state court judges to fear the federal court "looking over their shoulder" and invalidating their work. The adverse impact on finality typically associated with habeas review of state court judgments is just not implicated when the federal court reviews its own judgment and sentence,

examining the state court conviction solely within that context.

4. Respondent also argues that the court will be in a difficult position adjudicating the validity of prior state convictions where the State is not a party. Because the State is in the best position to marshal the factual and legal material necessary to defend its conviction, its absence will "increase the risk of an erroneous judgment." Resp. Br. 24. Again, that argument misses the point as demonstrated by the very case cited by respondent in support of its argument, *Parke v. Raley*, 506 U.S. 20, 31-32 (1992). In the cited passage, the Court acknowledged that "serious practical difficulties will confront any party assigned an evidentiary burden in such circumstances." In recognition, however, of the collateral nature of the challenge to the prior conviction, the Court found that assigning that burden (as well as the risk of error) to the defendant was not fundamentally unfair. Here, as well, petitioner, not the Government, bears the burden and risk of error inherent in the difficulty in obtaining records and evidence.[8]

---

[8] Indeed, if the State truly retained an interest in seeing that its judgment retain the conclusive force as a federal sentence enhancement, it could conceivably join the litigation. Rule 12 of the Rules Governing Section 2255 Proceedings gives the district court the authority to "apply the . . . Federal Rules of Civil Procedure . . . to motions filed under these rules." Fed.R.Civ.P. 24(a) allows a party to intervene in an action "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest. . . . " *See, e.g., State of Arizona v. Hunt*, 408 F.2d 1086 (6th

5. Finally, respondent alludes to the "windfall" petitioner will receive if he successfully demonstrates that the state court conviction suffered from a constitutional defect that undermined its reliability as federal sentencing predicate. Respondent argues because there is no possibility of a retrial, unlike a successful challenge to the conviction in a section 2254 proceeding, the constitutional error will immunize the defendant from liability. Resp. Br. 24. There is, however, no windfall and no immunity. Again, respondent confuses the challenge to the federal sentence with a challenge to the state court conviction. While there is no possibility of retrying him, there is no need. Petitioner has suffered and still suffers the state court convictions. All that it means is that the Government may not use the prior conviction to lengthen petitioner's federal sentence.[9]

Cir. 1969) (Attorney General of the State of Arizona allowed to intervene in a habeas corpus proceeding in federal court in Michigan defended by the Michigan Attorney General implicating constitutionality of Arizona trial of habeas petitioner).

[9] This distinction between punishment for the state prior conviction and its use to enhance a subsequent federal sentence is the same distinction that insulates recidivist statues from constitutional attack on double jeopardy grounds. *See, e.g., United States v. Bates*, 77 F.3d 1101, 1106 (8th Cir. 1996) (ACCA sentence does not violate double jeopardy because prior convictions are merely used to enhance current offense). Recidivist statutes "do not change the penalty imposed for the earlier conviction." They merely increase the penalty for the last offense committed by the defendant. *Nichols v. United States*, 511 U.S. 738, 747 (1994). By the same token, an attack on the prior conviction in this context is an attack on the current federal sentence and not the state court judgment.

Respondent next argues that this would result in an anomaly in that the prior conviction may not be used to enhance a federal sentence but may be used to enhance a later state sentence. Respondent asserts that this is inconsistent with the "respect for state court judgments that is a fundamental premise of our federal system." Resp. Br. 24-25, n.10. As stated before, allowing a defendant to challenge the use of a prior conviction to enhance his federal sentence does not dishonor the state court judgment. The state can have no interest in any collateral consequences attached to its judgment in a different jurisdiction. As long as the federal government honors the direct consequence of the state court judgment – conviction and imprisonment of the defendant[10] – it does not dishonor the state's judgment to fail to accord it conclusive weight for its collateral use to lengthen a federal sentence.[11]

---

[10] And of course, even where a federal court directly "dishonors" the state court judgment by granting a writ under 28 U.S.C. § 2254, reversing the conviction and freeing the defendant, it does not violate the Full Faith and Credit Clause of the Constitution. U.S. Const. Art. IV, § 1. Resp. Br. 25, n.10. The federal courts do so as a "bulwark against convictions that violate 'fundamental fairness.' " *Engle v. Issac*, 456 U.S. 107, 126 (1982) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977) (Stevens, J., concurring)).

[11] All of the concerns noted by respondent are implicated whenever a defendant challenges the validity of a prior state conviction that is used to enhance a federal sentence. Although 21 U.S.C. § 851 specifically allows such challenges, neither the Government nor any state has suggested that section 851 violates the principles underlying our federal system.

C. Petitioner's Custody Under the ACCA Sentence Allows Him to Challenge His Sentence to the Extent it Was Enhanced by Unconstitutional Prior Convictions

Petitioner is still in federal custody, serving his ACCA sentence; he is no longer in state custody on the state court convictions that served as the predicate for his ACCA sentence. Respondent contends that this latter fact puts the constitutionality of the prior conviction beyond the "reach of federal collateral attack." Resp. Br. 29. Although the state court judgment is beyond the reach of collateral attack, its constitutional reliability as the predicate for a federal sentence is not.

Maleng v. Cook, 490 U.S. 488 (1989) (per curiam) specifically found habeas jurisdiction to challenge a custodial sentence as enhanced by an invalid prior conviction. *Maleng*, 490 U.S. at 493-494. That *Maleng* found custody for subject-matter jurisdiction under those circumstances necessarily implies that a habeas court could litigate the validity of the prior conviction to the extent that it was used to enhance the custodial sentence. Respondent erroneously asserts that the Court reserved this question when it observed that it was not expressing a view on the extent that the prior conviction itself may be subject to challenge in the attack on the later sentence. Resp. Br. 28. That is wrong. *Maleng* decided that a defendant could challenge the use of the prior conviction to enhance his sentence. If not, there would be no point to finding habeas jurisdiction for the court to decide a question it could not decide. Instead, *Maleng* left open the question of whether the prior conviction itself could be vacated

(on habeas review of the custodial sentence), rendering it void.[12]

CONCLUSION

The Constitution does not countenance federal sentences predicated on unconstitutional and unreliable prior convictions; a section 2255 proceeding provides an appropriate forum for litigating for that claim. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender
G. MICHAEL TANAKA*
Deputy Federal Public Defender

321 East Second Street
Los Angeles, California 90012
(213) 894-4140

Counsel for Petitioner
**Counsel of Record*

---

[12] *See, e.g., Coss v. Lackawanna*, 204 F.3d 453, 472 & n.9 (3d Cir. 2000) (Rendell, J., concurring & dissenting), *cert. granted*, 121 S.Ct. 297 (Oct. 10, 2000) (noting that majority's remedy for finding of an unconstitutional prior conviction – grant of writ conditioned upon resentencing without enhancement *or* retrying earlier charge – implicitly resolves *Maleng's* open question).